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Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-46

ROUNDHOUSE CONSTRUCTION CORPORATION,
Petitioner

vs.

TELESCO MASONS SUPPLIES CO., ET ALS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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ROUNDHOUSE CONSTRUCTION CORPORATION,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Roundhouse Construction Corporation, prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Connecticut affirming the judgment of the Superior Court of the State of Connecticut, holding that the Mechanic's Lien Law, Connecticut General Statutes §§49-33 through 49-40(a) (Pertinent text set out verbatim in Appendix C), is unconstitutional.

I. OPINIONS BELOW

The opinion of the Supreme Court of the State of Connecticut dated April 22, 1975 is published in 36 *Connecticut Law Journal* No. 43, p. 1. A Motion to Reargue was denied on May 6, 1975 and a Stay of Execution was granted on May 30, 1975. A permanent official citation is not yet available. (The decision is set forth in Appendix A.)

The opinion of the Superior Court of the State of Connecticut (Fairfield County at Bridgeport, #152255) entered on June 20, 1974 is not officially reported. (It is set forth in Appendix B.)

II. JURISDICTION

The jurisdiction of the Supreme Court is invoked under Rule 19(a) of the Rules of the Supreme Court, and Title 28

United States Code, Section 1257 (3) on the grounds that review is sought by the Supreme Court of the United States by a Writ of Certiorari of a judgment of affirmance on appeal by the Supreme Court of the State of Connecticut, which judgment was dated April 22, 1975.

III. QUESTION PRESENTED

Does the Connecticut statutory scheme providing for the filing and enforcement of Mechanic's Liens violate the Due Process Clause of the 14th Amendment to the Constitution of the United States, because of the failure of the statutes involved to provide for notice and hearing; and,

Does the filing of a Mechanic's Lien constitute a 'taking of property' entitling one whose property is liened to the protection afforded by the Due Process Clause of the 14th Amendment?

IV. CONSTITUTIONAL PROVISIONS AND STATE STATUTES

U.S. Constitution — Fourteenth Amendment (Due Process Clause)

Connecticut General Statutes, Title 49, Section 33 through Section 40(a) (Mechanic's Lien Statutes, fully set out in Appendix C).

V. STATEMENT OF THE CASE

Applicant Roundhouse Construction Corporation caused a Mechanic's Lien to be filed on the Land Records of the Town of Ridgefield, County of Fairfield, State of Connecticut. Said lien was indexed against property of Fisher. Under the statutory scheme then valid, no notice nor opportunity to be heard prior to the filing of the lien was given to the property owners.

The statutory scheme provides that a foreclosure of said lien must be commenced within two (2) years of the filing date and Roundhouse did commence its action to foreclose within the statutory period.

It is possible that Fisher had no knowledge of the existence of the lien until being served with the foreclosure action since actual notice to them until the commencement of foreclosure is not required. A title examination could, theoretically, be the only source of knowledge to the liened party until a foreclosure was begun.

Fisher, by Order to Show Cause, sought to enjoin the foreclosure of the Mechanic's Lien and contested the validity of the lien itself, claiming the Connecticut statutory provisions are unconstitutional.

The Superior Court of the State of Connecticut granted Fisher's Application for Injunction and held that the lien of the applicant Roundhouse was void because the statute under which the lien was filed was unconstitutional. (Berdon, J.) (Appendix B.)

The Supreme Court of the State of Connecticut, in a lengthy opinion, affirmed, specifically concurring with the lower court finding that a taking did occur and holding that the Mechanic's Lien provisions of the Connecticut General Statutes were unconstitutional in that they violated the Due Process Clause of both the State of Connecticut and the 14th Amendment to the United States Constitution. Appendix A.

The judgment of the Supreme Court of the State of Connecticut is a final judgment.

The Supreme Court of the State of Connecticut has, many times, held that the meaning of the State Due Process Clause is coextensive with the interpretations given to the 14th Amendment Due Process Clause by the U.S. Supreme Court (*Katz v. Brandon,* 156 Conn. 521-537; *Cyphers v. Allyn,* 142 Conn. 699, 703).

VI. ARGUMENT

The United States Supreme Court has affirmed, albeit without opinion, the constitutionality of state Mechanic's Lien statutes very much similar to those existing in Connecticut.

In *Spielman-Fond, Inc. v. Hanson's Inc.*, 379 F. Supp. 997 (D. Ariz.), aff'd, 417 U.S. 901, 94 S. Ct. 2596, 41 L.Ed.2d 208, a three judge District Court for the District of Arizona found the Arizona statutory scheme relating to Mechanic's Liens valid. The Due Process Clause of the 14th Amendment was squarely faced and no violation thereof was found.

The Arizona statutory scheme in relation to Mechanic's Lien Laws (A.R.S. 33-981 et seq) is substantially similar to the Connecticut scheme, except that the maximum duration of the lien without commencement of foreclosure is limited to six (6) months in Arizona against two (2) years in Connecticut.

The Arizona District Court reviewed those Supreme Court cases dealing with the general topic of a property deprivation without a meaningful hearing within a meaningful time. (*Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556; *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113; *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1111, 25 L.Ed.2d 287; *Snaidach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349.) However, the court was not persuaded of the applicability of those cases because it found, as a matter of law, that the filing of the Mechanic's Lien under the Arizona statutes, did not constitute a deprivation. Without a deprivation or taking, so their rationale continues, the requirements of the Due Process Clause do not come into play.

It was this opinion of a three judge District Court in Arizona that the United States Supreme Court affirmed without opinion. The obvious interpretation, rightly or wrongly, that has to be put on this is that the United States

Supreme Court implicitly found that the economic impingement caused by the Mechanic's Lien filed without notice and hearing was of relatively minor consequence and that there was no violation of due process. One has to conclude that if a 'taking' has not occurred, it does not matter what procedure is followed after the filing.

In addition, the Federal District Court in South Dakota upheld the constitutionality of South Dakota's scheme (*Cook v. Carlson*, 364 F. Supp. 24 S.D. S.D.) as did a court in Florida, *Ruocco v. Brinker*, 380 F. Supp. 432 (S.D. Fla.). Thus courts have upheld the constitutionality of such statutes generally and they have specifically supported the Mechanic's Lien laws of Arizona, which are substantially similar to those in Connecticut.

It would appear that the series of Supreme Court decisions starting with *Snaidach*, supra, in 1969 have all been in favor of the debtor and the balancing act accomplished thereby was undoubtedly long overdue in respect to the application of due process to such creditor situations. In each of these cases, a significant property interest was taken away by an actual dispossession without a meaningful hearing at a meaningful time. The fact that the court in those cases has restored a balance between rights of creditors and rights of debtors does not justify a conclusion that creditors are not afforded protection where the potential for harm to a debtor is not egregious. (*Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed.2d 406). In *Mitchell*, even though property was sequestered without prior notice and hearing, a constitutional accommodation existed because of the rights of the creditor to protect its interest in the subject property.

The *North Georgia Finishing* case (. . U.S. . . , 95 S. Ct. . . . , 41 L.Ed.2d 751) does not aid the respondent. The deprivation of use of the garnished funds in that situation was total. No such total deprivation occurs in the typical Mechanic's Lien situation.

Although the statutory scheme for Mechanic's Liens in the vast majority of states does not provide for notice and hearing before the filing, an accommodation of the various interests does constitutionally exist. To require a hearing before filing a Mechanic's Lien would be self-defeating. An interim period dangerous to bona fide purchasers would result. The lien filing procedure ex parte is not meant to deprive the owner of possession but to give interim protection to laborers and materialmen by giving notice *(Cook v. Carlson,* supra). The court in *Cook* went on (p. 28) to say, "Since the 'taking' or deprivation, if one exists, is minimal, or at most, an impingement on an economic interest, the potential for harm to a laborer or supplier deprived of a summary method of protection has to be seriously considered in the balancing or accommodation of interest tests."

The statutes in neither Connecticut nor South Dakota provide for notice and hearing before filing, although post recording procedures exist there and are somewhat different.

Mechanic's Liens laws are being challenged in a number of states. In California, the statutory scheme is under attack and is winding its way through the courts *(Connolly v. Diamond,* Civil #2057, reported in 116 Cal. Rptr. 191, and now before the Supreme Court of the State of California).

Cases attacking Mechanic's Lien statutes are presently in the courts in Maryland and Georgia and elsewhere, although official reports of the proceedings in those states are not yet available.

The issues are substantially the same in all of the cases, including the ones recently decided.

VII. CONCLUSION

It is unquestioned that a conflict exists between the *Spielman-Fond* case, supra, and the conclusions of the lower court in this case. Because of the importance of the Mechanic's

Lien law to the construction industry, the practical and legal questions raised are of vital concern in state courts throughout the 50 states. Only the U.S. Supreme Court can make a conclusive determination of the issues presented. The balancing tests developed by a number of lower courts in upholding the constitutionality of their Mechanic's Lien Laws mandate a full hearing by the U.S. Supreme Court as the only body capable of finally deciding the equities. A further balancing must determine the rights of a party who suffers minimally because of a filing of a Mechanic's Lien and the rights of a huge and diverse industry which has relied upon the Mechanic's Liens Laws of the several states as strong and necessary protection not readily available in other ways.

The Petitioner claims that the Mechanic's Liens Laws of the State of Connecticut are constitutionally sound, that they do not violate the protection afforded by the 14th Amendment to the U.S. Constitution and that the serious and significant constitutional questions raised by the Supreme Court of the State of Connecticut must be further heard and decided.

WHEREFORE, the Petitioner prays that the United States Supreme Court grant this Petition For Writ of Certiorari.

Respectfully submitted,

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OCTOBER TERM, 1975

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APPENDIX

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B. Superior Court, Fairfield County — Opinion 14a

C. Mechanic's Lien Laws, Connecticut General Statutes, §§ 49-33, et seq. 30a

APPENDIX A

CONNECTICUT REPORTS

SUPREME COURT

February Term, 1975

ROUNDHOUSE CONSTRUCTION CORPORATION *v.* TELESCO MASONS SUPPLIES COMPANY, INC., ET AL.

Action for the foreclosure of a mechanic's lien, brought to the Superior Court in Fairfield County, where the defendants Fischer by counterclaim and cross complaint sought damages, invalidation of mechanics' liens filed by the plaintiff and the other defendants, and an injunction to restrain the imposition of those liens, and the issues were tried to the court, *Berdon, J.;* judgment for the defendants Fischer granting an injunction and invalidating the liens, from which only the plaintiff appealed to this court. *No error.*

David S. Grossman, with whom, on the brief, was *Sidney Burger,* for the appellant (plaintiff).

Herbert V. Camp, Jr., for the appellees (defendants Fischer).

William W. Sprague filed a brief as amicus curiae.

HOUSE, C. J. This action was brought by the plaintiff to foreclose a mechanic's lien on the property of the defendants Richard P. and Bonnie R. Fischer. The Fischers contracted with the plaintiff, Roundhouse Construction Corporation, for the construction of a geodesic dome for a residence on real property owned by them in the town of Ridgefield. After construction had begun and after some payments had been made on the contract, the Fischers ceased making payments, and the structure is incomplete.

On November 7, 1973, the plaintiff filed a mechanic's lien on the Fischer property and by complaint dated January 24, 1974, brought the present action to foreclose that lien. Also named as defendants in this action were four subcontractors who had filed mechanics' liens on the Fischer property.

The Fischers, hereinafter referred to as the defendants, denied the substantive portions of the plaintiff's complaint, asserted certain special defenses including a claim that the plaintiff's workmanship was unsatisfactory and that the structure had collapsed, counterclaimed against the plaintiff, and cross-complained against the four other lienors. One of the grounds set forth in the cross complaint and counterclaim was that the mechanics' liens were invalid in that they constituted a taking of the defendants' property without due process of law contrary to the provisions of the fourteenth amendment to the United States constitution. The Fischers then moved the court, on the same constitutional basis, for an order to show cause why an injunction should not be issued against maintaining the liens. An order to show cause was issued to all the lienors. The parties stipulated to the facts which we have hereinbefore briefly summarized and agreed that the Superior Court should determine the sole issue of the constitutional validity of the mechanics' liens on the Fischer property. The court, filing a well-reasoned memorandum of decision, found the Connecticut mechanic's lien statutes unconstitutional as violative of the due process clauses of the fourteenth amendment to the constitution of the United States and article first, § 10, of the constitution of Connecticut and rendered judgment enjoining the plaintiff and the other four lienor defendants from maintaining their mechanics' liens on the Fischer property and declaring the liens to be invalid. The present appeal was taken solely by the plaintiff. The other four lienor defendants against whom judgment was also rendered did not appeal.

The decisive issue on the appeal is whether the Connecticut statutory procedure governing mechanics' liens is unconstitutional because it does not comply with the due process of law requirements of the fourteenth amendment to the federal constitution and article first, § 10, of the Connecticut constitution. "We have held that these provisions of the federal and state constitutions have the same meaning and impose similar constitutional limitations." *Cyphers* v. *Allyn,* 142 Conn. 699, 703, 118 A.2d 318; *Katz* v. *Brandon,* 156 Conn. 521, 537, 245 A.2d 579. The appeal raises for the first time in this court a question as to the constitutionality of Connecticut's mechanic's lien procedure. The United States Supreme Court, however, has recently had occasion to consider the constitutionality of the attachment, garnishment, sequestration and mechanic's lien procedures in several states, and the decisions of that court guide and must control our decision.

The Connecticut mechanic's lien statutes are found in §§ 49-33 through 49-40a of the General Statutes. While the statutory provisions are too lengthy to be repeated here in their entirety, they provide, in brief, that "[i]f any person has a claim for more than ten dollars for materials furnished or services rendered in the construction, raising, removal or repairs of any building or any of its appurtenance . . . and such claim is by virtue of an agreement with or by consent of the owner of the land upon which such building is being erected or has been erected or has been moved, . . . such building, with the land on which it stands . . . shall be subject to the payment of such claim. Such claim shall be a lien on such land, building and appurtenances . . . ." General Statutes § 49-33.

Section 49-34 provides, in pertinent part, that "[n]o such lien shall be valid, unless the person performing such services or furnishing such materials, within sixty days after he has ceased to do so, lodges with the town clerk in the town in which such

building . . . is situated a certificate in writing, describing the premises, the amount claimed as a lien thereon and the date of the commencement of the performance of services or furnishing of materials, stating that the amount claimed is justly due, as nearly as the same can be ascertained, and subscribed and sworn to by the claimant; which certificate shall be recorded by the town clerk with deeds of land." Section 49-35 requires that subcontractors and materialmen whose written contracts with the original contractor have not been assented to in writing by the other party to the original contract and who claim mechanics' liens must give notice to the owner of the property against which the liens are claimed. This requirement of notice, however, does not apply to a principal contractor such as the present plaintiff. Section 49-36 provides that the amount of the lien on any building or its appurtenances cannot exceed the amount agreed upon in the contract for such building and its appurtenances, and § 49-37 provides that the owner of the real estate subject to the lien may apply to the Superior Court for dissolution of the lien upon substitution of a bond with surety. In addition, no mechanic's lien shall remain in force for a period longer than four years after it has been perfected unless the lienor commences an action to foreclose the lien within two years from the date the lien was filed, and provision is made for the discharge of the lien on the records if no action is brought to foreclose it within two years from the date it was perfected. General Statutes § 49-39. Section 49-51 permits any person having an interest in any real estate "described in any certificate of lien which lien is invalid but not discharged of record" to give notice to the lienor to discharge the lien and, if such request is not complied with in thirty days, to bring his complaint to the court which would have jurisdiction of the foreclosure of such lien, if valid, claiming such discharge. That court may adjudge the validity or invalidity of the lien, and a certified copy of a judgment of invalidity recorded on the land records shall fully discharge it.

The defendants argue that this mechanic's lien statutory scheme in Connecticut operates to deprive them of their property without the due process of law guaranteed them by the federal and state constitutions. More specifically, they assert that the Connecticut statutes fail to provide for prior notice to property owners such as themselves and an opportunity to be heard at a meaningful time and in a meaningful manner and that, under procedural due process standards, the absence of such provisions renders the procedure unconstitutional.

It is fundamental that property cannot be taken without procedural due process as guaranteed by the fourteenth amendment to the constitution of the United States and article first, § 10, of the constitution of Connecticut. For more than a century, the central meaning of procedural due process has been clear. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale,* 68 U.S. 223, 233, 17 L. Ed. 531; *Windsor* v. *McVeigh,* 93 U.S. 274, 23 L. Ed. 914; *Hovey* v. *Elliott,* 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215; *Grannis* v. *Ordean,* 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62. The United States Supreme Court has reiterated that these fundamental requirements apply to the deprivation of "any significant property interest." *Boddie* v. *Connecticut,* 401 U.S. 371, 379, 91 S. Ct. 780, 28 L. Ed. 2d 113. In *Bell* v. *Burson,* 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90, the Supreme Court held that the suspension of drivers' licenses "adjudicates important interests of the licensees" and that "[i]n such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." The court noted that "[t]his is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement

whether the entitlement is denominated a 'right' or a 'privilege'" and held (p. 542) that "it is fundamental that except in emergency situations . . . due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective."

This effective opportunity to be heard is the gravamen of the currently accepted standards of procedural due process in the area of property rights as now prescribed in the United States Supreme Court landmark cases of *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556; rehearing denied, 409 U.S. 902, 93 S. Ct. 177, 34 L. Ed. 2d 165; *Lynch* v. *Household Finance Corporation,* 405 U.S. 538, 92 S. Ct. 1113, 31 L. Ed. 2d 424, rehearing denied, 406 U.S. 911, 92 S. Ct. 1611, 31 L. Ed. 2d 822; and *Sniadach* v. *Family Finance Corporation,* 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349. It was these decisions, spelling out the requirements of due process of law in creditor proceedings, which led to the passage by the General Assembly of Public Acts 1973, No. 73-431, entitled "An Act Concerning Prejudgment Remedies," now chapter 903a of the General Statutes. See 16 Conn. H. Proc.,

vator, Inc. v. *Stoll,* Conn. (36 Conn. L.J., No. 34, p. 1). That act, however, has no application to the enforcement of mechanics' liens. By its terms, it is limited to "any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment but shall not include a temporary restraining order."

In *Sniadach,* the court held that the prejudgment garnishment of wages without notice and a prior hearing violated the fundamental principles of due process; and, in *Fuentes,* the court struck down the replevin statutes of Florida and Pennsylvania as

violative of the due process clause of the fourteenth amendment because they failed to provide for a hearing before the repossession of chattels. In both cases the court concluded that, under the statutes in question, the prejudgment deprivation of property, i.e., the actual dispossession of wages or personalty, was so severe that notice and a meaningful opportunity to be heard prior to the taking were required by the due process clause of the fourteenth amendment. *Fuentes* v. *Shevin,* supra, 96–97; *Sniadach* v. *Family Finance Corporation,* supra, 342.

The court appeared to retreat somewhat from the seemingly strict requirement of *Fuentes* v. *Shevin,* supra, that the hearing take place prior to the dispossession of personalty, when in a subsequent decision it upheld the constitutionality of the Louisiana sequestration statute. *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406. That statute allows to a holder of a mortgage or lien a writ of sequestration authorizing a constable to sequester and take possession of goods—in order to forestall encumbrance or alienation of the property subject to the mortgage or lien—without requiring that a hearing be held prior to the taking of the property from the debtor. The court noted two principal provisions present in the Louisiana statute which satisfied the requirements of procedural due process and thus obviated the necessity of a prior hearing. The first of these is that although the application for the writ is granted ex parte and without prior notice to the debtor, the writ itself issues only on the order of a judge and on a specific factual showing of the nature of the claim. Id., 606. Secondly, and more importantly, the Louisiana statute allows the debtor to seek immediate dissolution of the writ unless the creditor proves the grounds upon which the application for the writ was granted. Ibid. In addition, the party seeking the writ must furnish security for the payment of any damages the debtor may sustain when the writ is obtained wrongfully. Ibid.

Such a procedure, the court concluded, "effects a constitutional accommodation of the conflicting

interests of the parties." Id., 607. The court expressly refrained from overruling *Fuentes* and *Sniadach* and sought to distinguish those cases on the factual situations involved. *Mitchell* v. *W. T. Grant Co.*, supra, 614, 615.

In a very recent case, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, U.S. , 95 S. Ct. 719, 42 L. Ed. 2d 751, the court struck down a Georgia prejudgment garnishment statute in an opinion which substantially reaffirmed *Fuentes* v. *Shevin*, supra. Significantly, the court stated that the Georgia statute was not saved by the ruling in *Mitchell* v. *W. T. Grant Co.*, supra, since the statute possessed none of the characteristics of the Louisiana sequestration statute which we have noted above. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, supra, . It is also significant to note that although the *North Georgia Finishing* decision relied heavily on *Fuentes*, the court did not speak in terms of procedural due process as requiring a prior hearing, as it did in *Fuentes*, but, rather, an "early hearing." The difference is substantial. The clear indication now is that in testing whether a lien or sequestration procedure complies with the requirements of due process it will be examined in its entirety, and the lack of a provision for a prior hearing in and of itself will not be constitutionally fatal if other saving characteristics are present.

Although the United States Supreme Court has not as yet spoken definitively on the subject of the due process requirements of mechanic's lien statutes, it has affirmed without opinion a case involving the Arizona mechanic's lien statute. *Spielman-Fond, Inc.* v. *Hanson's, Inc.*, 379 F. Sup. 997 (D. Ariz.), aff'd, 417 U.S. 901, 94 S. Ct. 2596, 41 L. Ed. 2d 208. In that case, a three-judge United States District Court upheld the constitutionality of the Arizona statute on the ground that mechanics' and materialmens' liens did not amount to a taking significant enough for due process to require notice and an opportunity to be heard prior to the filing of the lien. Id., 999–1000. It is to be

noted, however, that the Arizona statute restricts the validity of a mechanic's lien to no longer than six months unless an action is brought to foreclose it within that period. Ariz. Rev. Stat. Ann. § 33-998 (1974). Such a provision would seem to offer the bare minimum of due process protection consistent with the extent of deprivation present.

Other lower federal courts have sustained the constitutional validity of questioned mechanic's lien procedures. In *Cook* v. *Carlson*, 364 F. Sup. 24 (S.D. S.D.), a federal district court in South Dakota upheld the mechanic's lien statute of that state, noting that the deprivation of property resulting from a mechanic's lien did not actually deprive the owner of the use or possession of his property to the extent present in *Fuentes* and *Sniadach* and concluding that notice and a hearing prior to filing of the lien are not required. That court used a balancing test, weighing, on the one hand, the extent of the deprivation involved and, on the other, the nature of the creditor's interest to be protected, and the court noted (p. 27) that the deprivation caused by the South Dakota mechanic's lien statute was mitigated by the provision in that statute which allowed the owner of the property subject to the lien to "force an expeditious adjudication on the merits, without cost to him, by demanding that the lien be foreclosed, whereupon the lienholder must commence foreclosure proceedings within thirty days or forfeit the lien."

In still another recent case, *Ruocco* v. *Brinker*, 380 F. Sup. 432 (S.D. Fla.), a Florida mechanic's lien statute withstood a constitutional attack on the ground of lack of procedural due process. Relying substantially on *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406, the court concluded that there is now a flexible test for determining the existence of due process and that a prior hearing is no longer constitutionally mandated in every case. *Ruocco* v. *Brinker*, supra, 437. The court refused to classify the deprivation of property rights under mechanic's lien laws as de mini-

mis, but, viewing the Florida statute in its entirety, found that it constitutionally accommodated the rights and interests of the parties. Ibid. Material factors in the court's analysis of the statute included the fact that although the statute did not require a hearing prior to the filing of the lien it did provide that a mechanic's or materialmen's lien may be discharged upon failure to enforce it within one year, and, in addition, the owner of property subject to a lien can force the lienor to bring suit within sixty days or the owner may institute a proceeding requiring the lienor to show cause why his lien should not be enforced by action or vacated and cancelled of record. Id., 434.

We have discussed these cases at some length because the precise constitutional due process requirements in legal sequestration procedures have not as yet been definitively prescribed by the United States Supreme Court. The general requirements, however, appear from an analysis of these cases, and it is clear that the present Connecticut mechanic's lien procedures do not meet those requirements of constitutional due process. Under Connecticut procedure, the party claiming the lien is not required to post any bond or provide any surety to protect the owner of the property subjected to the lien against damages from an unsupportable lien. Compare *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406; *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, U.S. , 95 S. Ct. 719, 42 L. Ed. 2d 751. The filing and perfection of the lien may be done by a claimant entirely ex parte, without authorization, supervision or control by a judicial officer. Compare *Mitchell* v. *W. T. Grant Co.*, supra. The certificate itself, which is recorded in the town clerk's office, is statutorily required to contain only a description of the subject premises, the date work was commenced, the amount claimed, and a statement that the amount claimed is justly due. General Statutes § 49-34. Such a certificate is a conclusory statement, totally devoid of any substantive underlying facts. Compare *Ruocco* v. *Brinker*, 380 F. Sup. 432 (S.D. Fla.).

Most conspicuously absent from the Connecticut procedure is any provision whatsoever for any sort of a timely hearing, either before or after the recording of the lien, which would give the property owner an opportunity to be heard or require the lienor to justify his lien. The statutes allow the lien to continue for two years without any further action on the part of the lienor, during which time the owner of the property is without recourse in the courts to contest the merits of the claim underlying the lien. Compare *Mitchell* v. *W. T. Grant Co.*, supra; *Cook* v. *Carlson*, 364 F. Sup. 24 (S.D. S.D.). As we have noted, the prejudgment remedy procedures for a judicial determination and a hearing provided by Public Acts 1973, No. 73-431 (General Statutes, c. 903a) were not made applicable to the enforcement of mechanics' liens, nor is there any statutory provision for a hearing on and discharge of an excessive lien such as exists in the case of excessive attachments. See General Statutes §§ 52-301, 52-302. The provision in General Statutes § 49-37 for the dissolution of a mechanic's lien upon the substitution of a bond does not afford adequate relief, since the authority of the court is limited to the issuance of an order dissolving the lien only upon the substitution of a bond "in such amount as a court of competent jurisdiction may adjudge to have been secured by such lien." In such a proceeding, "[t]he office of the judge before whom the application is pending, is to discover the amount of the plaintiff's apparent claim, and not to pass upon its legal validity or to weigh the chances of recovery upon it." *Sachs* v. *Nussenbaum*, 92 Conn. 682, 688, 104 A. 393.

The plaintiff argues that the "taking" of the property under a mechanic's lien statute is de minimis. It is true that the deprivation which results from the filing of a mechanic's lien is not as obvious or as great as the dispossession of property under the statutes struck down in *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, and *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349, but the recording of

a mechanic's lien, while it does not prevent alienation of the property, does, as a practical matter, severely restrict the opportunity for and possibility of its alienation. As the United States Supreme Court observed in *Fuentes* v. *Shevin,* supra, 86: "Any significant taking of property by the State is within the purview of the Due Process Clause." Referring to this statement from *Fuentes* in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* U.S. , 95 S. Ct. 719, 42 L. Ed. 2d 751, the United States Supreme Court continued: "Although the length or severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing, it was not deemed to be determinative of the right to a hearing of some sort. Because the official seizures had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession, they were held to be in violation of the Fourteenth Amendment."

We are well aware of the long history of mechanics' liens in this state, dating back to the Public Acts of 1836, chapter 76. We have recognized the remedial intent of the law governing a mechanic's lien, which is the creature of statute, and have consistently construed the statute "so as to reasonably and fairly carry out its remedial intent." *Parsons* v. *Keeney,* 98 Conn. 745, 748, 120 A. 505; *City Lumber Co.* v. *Borsuk,* 131 Conn. 640, 645, 41 A.2d 775. We are not unmindful of the presumption of constitutionality which attaches to a statutory enactment and the burden which rests upon a party asserting its invalidity to establish not only that it is unconstitutional beyond a reasonable doubt but that its effect or impact on him adversely affects a constitutionally protected right which he has. *Lublin* v. *Brown,* Conn. (36 Conn. L.J., No. 39, pp. 14, 16); *Adams* v. *Rubinow,* 157 Conn. 150, 152, 251 A.2d 49. Nevertheless, we must conclude that the absence of a statutory provision for a hearing for the defendants "at a meaningful time and in a meaningful manner"; *Armstrong* v. *Manzo,* 380 U.S. 545,

552, 85 S. Ct. 1187, 14 L. Ed. 2d 62; has deprived them of their constitutional rights to due process of law as those rights have been recently enunciated by the United States Supreme Court. We, accordingly, find no error in the judgment of the Superior Court.

There is no error.

In this opinion the other judges concurred.

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APPENDIX B

No. 15 22 55

ROUNDHOUSE CONSTRUCTION CORP. SUPERIOR COURT,

vs. FAIRFIELD COUNTY (BRIDGEPORT).

TELESCO MASONS SUPPLIES CO., INC., ET ALS JUNE 20, 1974.

MEMORANDUM OF DECISION

This is an action to foreclose a certain mechanic's lien filed by the plaintiff-contractor. On July 18, 1973, the defendants Fischers, residents of the state of New York, contracted with the plaintiff for the construction of a geodesic dome for a personal residence on real property owned by them, which is located in the town of Ridgefield, Connecticut. The contract for the construction of this residence was for $58,595.00.

Since the beginning of the work, the defendants Fischers have paid from their own funds to the plaintiff on account of said contract $13,595.00 and an additional $3,725.00 for extras. For a variety of reasons not relevant to this decision, the defendants Fischers refused to make further payments on the contract and the construction of the dome stopped and it is presently incomplete.

The plaintiff-contractor filed its mechanic's lien on November 7, 1973, in the amount of $20,000.00. The other defendants are sub-contractors who allegedly supplied services and/or materials in the construction of the house and have filed the following mechanic's liens: the defendant Telesco Masons Supplies Co., Inc. filed on November 16, 1973, in the amount of $2,825.46; the defendant Ridgefield Supply Company filed on November 30, 1973, in the amount of $2,125.73; the defendant Designs Unlimited filed on November 30, 1973, in the amount of $1,735.25; and the defendant Harold Bishop, doing business as Bishop Associates, filed on December 20, 1973, in the amount of $4,500.00.

The parties are before this court on an order to show cause brought by the defendants Fischers claiming that a permanent injunction be issued against the plaintiff and the other defendants from maintaining the mechanics' liens against the subject property. They claim the liens are invalid because they constitute a taking of property without due process as required under the Fourteenth Amendment of the United States Constitution. The parties stipulated to the facts and agreed that the court should at this time determine this issue.

The mechanic's lien statutory scheme which is being challenged in the case provides, inter alia, that

"(i)f any person has a claim for more than ten dollars for materials furnished or services rendered in the construction, ... of any building ... and such claim is by virtue of an agreement with or by consent of the owner of the land upon which such building is being erected ... or of some person having authority from or rightfully acting for such owner in procuring such labor or materials, such building, with the land on which it stands, shall be subject to the payment of such claim. Such claim shall be a lien on such land, building and appurtenances ... " Sec. 49-33 of the General Statutes. The lien is limited to the total amount the owner agreed to pay for such building. Sec. 49-36 of the General Statutes. The lien becomes perfected if the person performing such services or furnishing such materials shall " '... within sixty days after he has ceased to do so, lodges with the town clerk of the town in which such building is situated a certificate in writing, describing the premises, the amount claimed as a lien thereon and the date of the commencement of the performance of services or furnishing of materials, stating that the amount claimed is justly due, as nearly as the same can be ascertained, and subscribed and sworn to by the claimant; ..." Sec. 49-34, General Statutes.

The statute goes further; it allows a sub-contractor to file such a lien against the property for which he furnished labor and/or materials. For sub-contractors, there is also an additional requirement that they must not later than sixty days after ceasing to furnish the materials or render the services give written notice to the owner of the building that they have furnished or commenced to furnish the materials and/or render the services and intend to claim a lien on the building. Sec. 49-34 of the General Statutes.

It is important to note that the statutory procedure provides no opportunity for a hearing prior to perfecting the mechanic's lien on the real property.[1] In fact, unlike our prior laws on attachment, garnishment, and replevin, which at least required action on the part of a commissioner of the superior court,[2] the mechanic's lien may be perfected and filed solely by the creditor.

The purpose of the mechanic's lien statute, which was first enacted in 1836, " ... is to give to building creditors certain peculiar and different rights from those enjoyed by general creditors." New Haven Orphan Asylum v. Haggerty Co., 108 Conn. 232, 237, 238. Its design was to give a special security interest to that class of creditors involved in the building trades. Balch v. Chaffee, 73 Conn. 318, 320. For a comprehensive history of the Connecticut mechanic's lien statute see New Haven Orphan Asylum v. Haggerty, supra.

It is fundamental law that property cannot be taken without procedural due process. This is guaranteed to us by the Fourteenth Amendment to the constitution of the United States and the First Article of the Constitution of the state of Connecticut. "We have held that these provisions of the federal and state constitutions have the same meaning and impose similar constitutional limitations." Cyphers v. Allyn, 142 Conn. 699, 703.

Boddie v. Connecticut, 401 U.S. 371, 377, makes clear a principle which has been firmly established in the development of our constitutional law over the last hundred years. "(D)ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." (emphasis added) The opportunity to be heard must be granted at a " ... meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552.

The filing of a mechanic's lien is a taking of property within the constitutional sense. The mechanic's lien is no different in its effect on property than a real estate attachment. Although the lien does not deprive the owner of possession, such as replevin or garnishment does, it is equally repugnant in that it restricts the owner's ability to sell or mortgage or rent the property for its full value.

So, in the case of Bay State Harness Horse R. & B. Association v. P.P.G. Industries, Inc., 365 Fed. Sup. 1299, the court held at pp. 1304-5: "Nevertheless, even viewing the attachment as a non-possessory lien (Cohen v. Wasserman, 238 F.2d 683 (1st Cir. 1956)), or as merely an encumbrance or cloud on the title (N.Y. N.H. & H. R. R. v. Butter, 276 Mass. 236, 176 N.E. 797 (1931)), the interest created by the attachment operates as a superior interest against subsequent purchasers, mortgagees or attaching creditors, and thus restricts the owner's ability to sell or mortgage the property at its full value. The determinative impact of the attachment is that it deprives the owner of a property right or interest significant not only to him in his use of the property but to the attaching party as well. The nature of such deprivation has been recognized even by earlier courts which refused to sustain a constitutional challenge to prejudgment attachments." Clement v. Four North State Street Corp., 360 F. Sup. 933, 935; Gunter v. Merchants Warren National Bank, 360 F. Sup. 1085.

The rationale of Fuentes v. Shevin, 407 U.S. 67, fully applies to the instant case. The court at pp. 80-1 held in that case the following:

"The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment - to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. See Lynch v. Household Finance Corp., 405 U.S. 538, 552.

The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decisionmaking that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. ... /And n/o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172 (Frankfurter, J., concurring)."

Fuentes makes clear that notice and a right to a hearing "... must be granted at a time when the deprivation can still be prevented." Fuentes, supra, p. 81. That clearly is before the lien attaches. The mechanic's lien certainly does not fall within one of the "extraordinary situations". Boddie v. Connecticut, supra, at p. 379. These extraordinary situations which would permit such a lien before notice and hearing " ... must be truly unusual." Fuentes v. Shevin, supra, at p. 90.

Furthermore, it would clearly appear that the claims of a creditor who furnished labor or materials to improve real property requires less of a summary procedure to protect his interests in the real property than a creditor involved in personal property. The latter may very well involve a situation where the debtor may destroy or conceal the personal property which, of course, is not the case with real property.

The problem with Connecticut's mechanic's lien procedure does not stop with just the failure to provide for a prior hearing and notice; it goes further. There is no procedure by which a mechanic's lien wrongfully filed can be discharged, short of its validity being determined at the time of foreclosure. This being a statutory proceeding, the jurisdiction of the court is determined by the provisions of the statute. There being no statutory authority to dissolve a mechanic's lien, the court has no jurisdiction to do so. Sachs v. Nussenbaum, 92 Conn. 682, 687.

In the case of Ravitch v. Stollman Poultry Farms, Inc., 162 Conn. 26, 35, our Supreme Court recently cited Sachs v. Nussenbaum, supra, with approval and held the following pertaining to an attachment of real estate, to wit:

" ... the language of the statute which allows such a dissolution only when the attachment is excessive, and, in ordering a dissolution, the judge had no power to test the legal sufficiency of the complaint or to weigh the chances for the plaintiff's recovery of his claim."

The Supreme Court of the United States in the case of Lynch v. Household Finance Corp., 405 U.S. 538, discussed the state's prior garnishment statutes,[3] which procedure was similar to that of a mechanic's lien in that it did not require court participation. The court, at p. 555, stated the following: "More important, the state court and its officers are insulated from control over the garnishment. Connecticut appears to be one of the few States authorizing an attorney for an alleged creditor to garnish or attach property without any participation of a judge or clerk of the court. ..." In the case of a mechanic's lien, it must be remembered state law does not even require an attorney; the creditor himself may file and perfect such a lien. The court also commented, at p. 555, about our garnishment statute as follows: "A person whose account has been seized can get only minimal relief at best." Footnote 26 of the opinion provided the following: "The courts have no authority to inquire into the probable validity of the creditor's claim, or whether special circumstances warrant provisional security for an alleged creditor. Sachs v. Nussenbaum, 92 Conn., at 689, ... Prior to the termination of the litigation, a garnishment may be reduced or dissolved only upon a showing that the garnishment is excessive - i.e., in excess of the creditor's apparent claim - or upon substitution of a bond with surety. ... This involvement has been termed 'meager'." It is, therefore, apparent there is no way prior to foreclosure of the

mechanic's lien for the owner of the property subject to such a lien to test the probable validity of the creditor's claim.[4] Foreclosure procedure of the mechanic's lien can extend for a period of four years. See Sec. 49-39 of the General Statutes. It cannot be said that this is a hearing at a "meaningful time and in a meaningful manner."

The fact that the lien may be dissolved upon substitution of a bond with surety, Sec. 49-37 of the General Statutes,[4a] does not make it constitutionally acceptable. The debtor is still deprived of his property " ... whether or not he has the funds, the knowledge, and the time needed to take advantage of the recovery provision." Fuentes v. Shevin, supra, at p. 85.

The Supreme Court of the United States has recently decided the case of Mitchell v. Grant Co., 42 L.W. 4671 (May 13, 1974). This case upholds the constitutionality of Louisiana's sequestration statute, which requires no prior notice or hearing. In a strongly worded dissent, Justice Stewart proclaimed the following:

> "In short, this case is constitutionally indistinguishable from Fuentes v. Shevin, and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the Fuentes dissent. In light of all that has been written in Fuentes and in this case, it seems pointless to prolong the debate. Suffice it to say that I would reverse the judgment before us because the Louisiana sequestration procedure fails to comport with the requirements of due process of law." [5]

But even within the holding of Mitchell v. Grant, the mechanic's lien law of the state is unconstitutional. In the Mitchell case, the debtor may immediately have a full hearing following the execution of the writ; in Connecticut, the debtor is not entitled to a hearing until the time the lien is actually foreclosed which may be as long as four years after its perfection.[6] In the Mitchell case, the court pointed out the judge issues the writ of sequestration only on a "clear showing"; in Connecticut, the mechanic's lien is issued and filed on the land records by the creditor. In the Mitchell case, the right of sequestration is limited to the existence of a lien specifically granted to the vendor and the issue of default; in Connecticut, no specific lien is given by the property owner and there need not be a default on the part of the debtor. Clearly, even under the Supreme Court's recent pronouncement in the Mitchell case, Connecticut's mechanic's lien law is unconstitutional in that it is violative of the due process clauses of the constitution of the United States and the state of Connecticut.

The defendant-lienholders in the case argue that justice requires the protection of those who furnish labor and material and thereby enhance the value of the debtor's property. This court cannot quarrel with this philosophy. What the defendant-lienholders fail to recognize is that the property owner must also be protected against having his property taken without due process of law. The mechanic's lien procedure in Connecticut does not represent " ... a constitutional accommodation of the conflicting interests ... " Mitchell v. Grant, supra, at p. 4673.

It would appear to this court that due process provisions require an opportunity to be heard before the creditor has a right to place such a lien on the property of the owner or, at the very least, there should be an immediate hearing after the perfection of the lien to determine if there is probable cause to sustain the validity of the creditor's claim. The right to substitute a bond for such a lien is not the answer. In such a case the property owner is forced to substitute other property in violation of the constitution for the release of such a lien. See Fuentes v. Shevin, supra, at p. 84-85.

This court is mindful of its obligation when reviewing the constitutionality of a statute. "When a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear. ... (cases cited) 'It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained.' Holmes, J., in Interstate Consolidated Street Ry. Co. v. Massachusetts, 207 U.S. 79, 88, 28 S. Ct. 26, 52 L.Ed. 111." Snyder v. Newtown, 147 Conn. 374, 390.

The instant matter is a clear case where the state statute is violative of the due process clause of the constitutions of the United States and the state of Connecticut. The owners in this case have sustained their burden of overcoming the presumption of constitutionality of the statutes pertaining to mechanics' liens.

The court hereby issues a permanent injunction against the plaintiff, Roundhouse Construction Corp., and the defendants Telesco Masons Supplies Co., Inc., Ridgefield Supply Company, Designs Unlimited, and Harold Bishop, doing business as Bishop Associates, from maintaining their respective mechanic's lien on the real property of the defendants Richard P. Fischer and Bonnie R. Fischer more particularly described in the complaint, and the court hereby dissolves said mechanics' liens and declares them to be invalid.

Robert J. Berdon, J.

FOOTNOTES:

1 The statutes also provide that if the creditor perfects his lien within sixty days after he ceases to render services or furnish materials the lien " ... shall take precedence over any other encumbrance originating after the commencement of such services, or the furnishing of any such materials, ... " Sec. 49-33 of the General Statutes. The court finds that it is not necessary for its decision to deal with this hiatus, but it is pointed out that this also poses serious constitutional questions which should be taken into account if the legislature should address itself to this problem in the future.

2 Even prior to Public Act 73-431, providing for a constitutional method of attachment, garnishment, and replevin, the statutes required that the mense process be signed by a commissioner of the Superior Court, or a judge, or a clerk of the court. Sec. 52-89 of the General Statutes.

3

The Connecticut legislature having seen the handwriting on the wall with the decision of Lynch v. Household Finance Corp., 405 U.S. 552 (1972) and Ibid. 360 F.S. 720 (1973) enacted on May 30, 1973, Public Act No. 73-431 entitled, "Prejudgment Remedies". This Statute provides for a constitutional method in which a creditor may secure an attachment and garnishment, and replevy goods. It provides for a hearing for probable cause on the validity of the claim prior to the securing of such prejudgment remedy, except for certain specific situations enumerated in the statute.

4

An invalid mechanic's lien may be subject to discharge under Sec. 49-51 of the General Statutes or by instituting an independent equitable action. Fourth N.L. NSB Quarters, Inc. v. Wyoming Valley Contractors, Inc., 22 Conn. Sup. 293, 296. Both of these procedures if available to the landowner would require independent litigation and considerable time. The landowner should not be required to initiate either of these procedures in order to exercise his constitutional rights of due process of the law.

4a Infra.

5

In his minority decision, Justice Stewart correctly pointed out that the court was overruling the Fuentes case. He cautioned the court as follows:

"I would add, however, a word of concern. It seems to me that unless we respect the constitutional decisions of this Court, we can hardly expect that others will do so. Cf. Roofing Wholesale Co. v. Palmer, 108 Ariz. 508, 502 P. 2d 1327 (1972). A substantial departure from precedent can only be justified, I had thought, in the light of experience with the application of the rule to be abandoned or in the light of an altered historic environment. Yet the Court today has unmistakably overruled a considered decision of this Court that is barely two years old, without pointing to any change in either societal perceptions or basic constitutional understandings that might justify this total disregard of stare decisis."

"The writ is obtainable on the creditor's ex parte application, without notice to the debtor or opportunity for a hearing, but the statute entitles the debtor immediately to seek dissolution of the writ, which must be ordered unless the creditor 'proves the grounds upon which the writ issued.' Art. 3506, the existence of the debt, lien, and delinquency, failing which the court may order return of the property and assess damages in favor of the debtor, including attorney's fees."

Mitchell v. Grant, supra, at p. 4673

Sec. 49-37 of the Connecticut General Statutes provides in part the following:

" ... If such judge is satisfied that the applicant in good faith intends to contest such lien, he shall, if the applicant offers a bond, with sufficient surety, conditioned to pay to the lienor or his assigns such amount as a court of competent jurisdiction may adjudge to have been secured by such lien, with interest and costs, order such lien to be dissolved and such bond substituted therefor and shall return such application, notice, order and bond to the clerk of the superior court for the county wherein such lien is recorded; and, if the applicant, within ten days from such return, causes a copy of such order, certified by such clerk, to be recorded in the town clerk's office where such lien is recorded, such lien shall be dissolved. ..."

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APPENDIX C

(1967, P.A. 436, S. 1—6.)
Former section cited. 23 CS 580.

Sec. 49-33. Mechanic's lien. Precedence. Rights of subcontractors. If any person has a claim for more than ten dollars for materials furnished or services rendered in the construction, raising, removal or repairs of any building or any of its appurtenance or in the improvement of any lot or in the site development or subdivision of any plot of land, and such claim is by virtue of an agreement with or by consent of the owner of the land upon which such building is being erected or has been erected or has been moved, or by consent of the owner of the lot being improved or by consent of the owner of the plot of land being improved or subdivided, or of some person having authority from or rightfully acting for such owner in procuring such labor or materials, such building, with the land on which it stands or such lot or in the event that such materials were furnished or services were rendered in the site development or subdivision of any plot of land, then such plot of land, shall be subject to the payment of such claim. Such claim shall be a lien on such land, building and appurtenances or lot or in the event that such materials were furnished or services were rendered in the site development or subdivision of any plot of land, then on such plot of land and shall take precedence over any other encumbrance originating after the commencement of such services, or the furnishing of any such materials, subject to apportionment as provided in section 49-36. If any such liens exist in favor of two or more persons for materials furnished or services rendered in connection with the same construction, raising, removal or repairs of any building or any of its appurtenances, or in the improvement of any lot, or in the site development or subdivision of any plot of land no one of such persons shall have any priority over another except as hereinafter provided. If any instrument constituting a valid encumbrance upon such land other than a mechanic's lien is filed for record while such building is being constructed, raised, removed or repaired, or such lot is being improved, or such plot of land is being improved or subdivided, all such mechanic's liens originating prior to the filing of such instrument for record shall take precedence over such encumbrance and no such lien shall have priority over any other such lien, but such encumbrance and all such liens shall take precedence over any mechanic's lien which originates for materials furnished or services rendered after the filing of such instrument for record, but no one of such liens originating after the filing of such instrument for record shall have precedence over another. If any lienor waives or releases his lien or claim of precedence to any such encumbrance, such lien shall be classed with and have no priority over liens originating subsequent to such encumbrance. No mechanic's lien shall attach to any such building or its appurtenances or to the land on which the same stands or to any lot or to any plot of land, in favor of any subcontractor to a greater extent in the whole than the amount which the owner has agreed to pay to any person through whom such subcontractor claims subject to the provisions of section 49-36. Any such subcontractor shall be subrogated to the rights of the person through whom such subcontractor claims, except that such subcontractor shall have such a lien or right to claim such a lien in the event of any default by such person subject to the provisions of sections 49-34, 49-35 and 49-36, provided the total of such lien or liens shall not attach to any building or its appurtenances, or to the land on which the same stands or to any lot or to any plot of land, to a greater amount in the whole than the amount by which the contract price between the owner and such person exceeds the reasonable cost, either estimated or actual, as the case may be, of satisfactory completion of the contract plus any damages resulting from such default for which such person might be held liable to the owner and all bona fide payments, as defined in section 49-36, made by the owner before receiving notice of such lien or liens. In the case of the removal of any building, no such mechanic's lien shall take precedence over any encumbrance upon the land to which such building has been removed which accrued before the building was removed upon the land. Any mechanic's lien may be foreclosed in the same manner as a mortgage.

(1949 Rev., S. 7217; 1949, 1953, S. 2973d; P.A. 74-310, S. 1.)

Sec. 49-34. Certificate of lien to be recorded. No such lien shall be valid, unless the person performing such services or furnishing such materials, within sixty days after he has ceased to do so, lodges with the town clerk of the town in which such building, lot or plot of land is situated a certificate in writing, describing the premises, the amount claimed as a lien thereon and the date of the commencement of the performance of services or furnishing of materials, stating that the amount claimed is justly due, as nearly as the same can be ascertained, and subscribed and sworn to by the claimant; which certificate shall be recorded by the town clerk with deeds of land. If a party who might have filed such a certificate dies before filing the same, the executor of his will or administrator of his estate may make and lodge such a certificate within three months from the time of qualification of such executor or administrator, provided such certificate shall be lodged within six months from the decease of the original claimant.

Sec. 49-35. Notice of intent. Liens of subcontractors and materialmen. No person other than the original contractor for the construction, raising, removal or repairing of the building, or the development of any lot, or the site development or subdivision of any plot of land or a subcontractor whose contract with such original contractor is in writing and has been assented to in writing by the other party to such original contract, shall be entitled to claim any such lien, unless, after commencing, and not later than sixty days after ceasing, to furnish materials or render services for such construction, raising, removal or repairing, he gives written notice to the owner of such building that he has furnished or commenced to furnish materials, or rendered or commenced to render services, and intends to claim a lien therefor on such building, lot or plot of land; which notice shall be served upon such owner, if he resides in the same town in which such building is being erected, raised, removed or repaired or such lot is being improved, or such plot of land is being improved or subdivided, by any indifferent person, by leaving with him or at his usual place of abode a true and attested copy thereof. If such owner does not reside in such town, but has a known agent therein, such notice may be so served upon such agent, otherwise it may be served by any indifferent person, by mailing a true and attested copy of such notice to such owner at the place where he resides. When there are two or more owners, such notice to one of them shall be notice to all. Such notice, with the return of the person who served it endorsed thereon, shall be returned to the original maker thereof within said period of sixty days. No subcontractor, without a written contract complying with the provisions of this section, and no person who furnishes material or renders services by virtue of a contract with the original contractor or with any subcontractor, shall be required to obtain an agreement with, or the consent of, the owner of the land, as provided in section 49-33, to enable him to claim a lien under this section.

Sec. 49-36. Liens limited; apportionment; payments to original contractor. No such lien shall attach to any building or its appurtenances, or to the land on which the same stands, or any lot, or any plot of land, in favor of any person, to a greater amount in the whole than the price which the owner agreed to pay for such building and its appurtenances or the development of any such lot, or the development of any such plot of land. When there are several claimants and the amount of their united claims exceeds such price, the claimants, other than the original contractor, shall be first paid in full, if the amount of such price is sufficient for that purpose; but, if not, it shall be apportioned among the claimants having such liens, other than the original contractor, in proportion to the amount of the debts due them respectively; and the court having jurisdiction thereof, on application of any person interested, may direct the manner in which such claims shall be paid; but, in determining the amount to which any lien or liens shall attach upon any land or building, or lot or plot of land, the owner of such land or building or lot or plot of land shall be allowed whatever payments he has made, in good faith, to the original contractor or contractors, before receiving notice of such lien or liens. No payments made in advance of the time stipulated in the original contract shall be considered as made in good faith, unless notice of intention to make such payment has been given in writing to each person known to have furnished materials or rendered services at least five days before such payment is made.

Sec. 49-37. Dissolution of mechanic's lien by substitution of bond. Joinder of actions on claim and bond. Whenever any mechanic's lien has been placed upon any real estate pursuant to sections 49-33, 49-34 and 49-35, the owner of such real estate, or any person interested therein, may make an application to any judge of the superior court or of the court of common pleas that such lien be dissolved upon the substitution of a bond with surety, and such judge shall order reasonable notice to be given to the lienor of such application. If such lienor is not a resident of the state, such judge may order notice to be given by publication, registered or certified letter or personal service. If such judge is satisfied that the applicant in good faith intends to contest such lien, he shall, if the applicant offers a bond, with sufficient surety, conditioned to pay to the lienor or his assigns such amount as a court of competent jurisdiction may adjudge to have been secured by such lien, with interest and costs, order such lien to be dissolved and such bond substituted therefor and shall return such application, notice, order and bond to the clerk of the superior court for the county wherein such lien is recorded; and, if the applicant, within ten days from such return, causes a copy of such order, certified by such clerk, to be recorded in the town clerk's office where such lien is recorded, such lien shall be dissolved. Whenever a bond is substituted for any lien after an action for the foreclosure of a lien has been commenced, the plaintiff in such foreclosure may amend his complaint, without costs, so as to make the action one upon such bond with which the plaintiff may join an action to recover upon his claim.

Whenever a bond is substituted for any lien before an action for the foreclosure of the lien has been commenced, the plaintiff may join the action upon the bond with an action to recover upon his claim. Whenever a bond has been substituted for any lien, pursuant to this section, unless an action is brought to recover upon such bond within two years from the date of recording the certificate of lien, such bond shall be void.

(1949 Rev., S. 7221; 1955, S. 2975d.)

See Sec. 52-192.

In action on bond, no recovery can be had for loss due to being prevented from completing contract. 89 C. 107. Amending complaint to show substitution of bond for lien. 95 C. 401. Cited. 144 C. 499.

In an action to recover upon a bond, defense that lien was invalid as a blanket lien must be specially pleaded. 147 C. 351.

Cited. 15 CS 361; 23 CS 380.

Cited. 2 Conn. Cir. Ct. 622. 6 Conn. Cir. Ct. 456.

Sec. 49-38. Lien on railroad for services or materials in construction. If any person has a claim for materials furnished or services rendered for the construction of any railroad, or any of its appurtenances, under any contract with or approved by the corporation owning or managing it, such railroad shall, with its real estate, right-of-way, material, equipment, rolling stock and franchises, be subject to the payment of such claim; and such claim shall be a lien on such railroad, railroad property and franchises, and such lien shall be asserted, perfected and foreclosed in all respects in accordance with the provisions of sections 49-34 to 49-37, inclusive, except that the certificates of the lien and of its discharge shall be filed in the office of the secretary of the state, who shall record them in a book kept for that purpose.

(1949 Rev., S. 7222.)

Statute includes street railways. 78 C. 292. General discussion. 83 C. 82.

Cited. 23 CS 380.

Cited. 2 Conn. Cir. Ct. 622.

Sec. 49-39. Time limitation of mechanic's lien. Action to foreclose privileged. No mechanic's lien shall continue in force for a longer period than four years after such lien has been perfected, unless the party claiming such lien commences an action to foreclose the same and files a notice of lis pendens in evidence thereof with the town clerk within two years from the date such lien was filed with such town clerk. Each such lien, after the expiration of such two-year period without action commenced and notice thereof filed as aforesaid, shall be invalid and discharged as a matter of law. An action to foreclose a mechanic's lien shall be privileged in respect to assignment for trial.

(1949 Rev., S. 7223; February, 1965, P.A. 193; 1969, P.A. 732; P.A. 73-506; P.A. 74-128.)

See Sec. 52-192.

Necessity of serving cross complaint on all parties. 101 C. 664. Action must be commenced within two year limit; reaching this point by demurrer. Id., 665. Does not apply retroactively as amended 1965. 161 C. 191.

Under statute prior to 1965 amendment: Mechanic's lienor made a party defendant in action to foreclose a mortgage on leased property within two years of perfecting lien, held lienor need not institute his own action to foreclose but his claim was transferred to proceeds of first judicial sale. 20 CS 460. History discussed. Action on lien must be commenced within two years, but reduction to final judgment is not limited to that period. 23 CS 329. Cited. 23 CS 380.

Cited. 2 Conn. Cir. Ct. 622.

Sec. 49-40. Record of discharge of mechanic's and judgment liens. Section 49-40 is repealed.

(1949 Rev., S. 7224; 1949, 1953, S. 2976d; 1969, P.A. 653; 1971, P.A. 181, S. 2.)

Sec. 49-40a. Mechanic's and judgment liens expired by limitation of time. Any mechanic's lien which has expired because of failure to comply with the time limitations of section 49-39 or any judgment lien which has expired for failure to comply with the time limitation of section 49-46 shall be automatically extinguished and the continued existence of such lien unreleased of record shall in no way affect the record owner's title nor the marketability of the same.

(1971, P.A. 181, S. 1.)

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-46

ROUNDHOUSE CONSTRUCTION CORPORATION,
Petitioner

vs.

TELESCO MASONS SUPPLIES CO., ET ALS

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

Herbert V. Camp, Jr.
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Ridgefield, Connecticut 06877

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Respondent, Richard and Bonnie Fischer, oppose granting of Petitioner's writ of certiorari on the grounds that the question presented is moot.

1. The opinion of the trial court states "The instant matter is a clear case where the state statute is violative of the due process of the clause of the constitutions of the United States **and the State of Connecticut**" (Petition, Appendix B, page 25a; emphasis added).

2. The Supreme Court of the State of Connecticut in the opinion from which the present writ is sought affirmed the decision of the Superior Court and noted that the decisive issue was whether or not the statutory procedure in Connecticut is unconstitutional "because it does not comply with the due process of law requirements of the fourteenth amendment to the federal constitution **and Article first, Sec. 10 of the Connecticut Constitution** (Petition, Appendix A, page 3a; emphasis added).

Petitioner in his brief states that the Supreme Court of the State of Connecticut held the Connecticut mechanics' lien statute unconstitutional in that they violated the due process clause of "**both the State of Connecticut** and the 14th amendment to the United States Constitution" (Petition, page 3; emphasis added).

No matter what decision the Supreme Court of the United States may make, it cannot reverse the decision of the Supreme Court of Connecticut in finding the Connecticut mechanics' lien statute invalid under the Connecticut Constitution.

Therefore the question raised in the Petition is moot and Petitioner's writ of certiorari ought to be dismissed. See **Aikens v. California**, 406 U.S. 813 (1972), **Smith v. Jennings**, 206 U.S. 276 (1907).

Respectfully submitted,

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